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No. 97-1357

In The

Supreme Court of the United States

October Term, 1997

JOHN W. THOMPSON, et al.,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF DEAN CRIST IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF DEAN CRIST IN SUPPORT OF PETITIONERS

The amicus, Dean Crist, by and through his attorneys, Hinshaw & Culbertson, moves for leave to file a brief in support of the petitioners' case for the following reasons:

1. On February 18, 1998, pursuant to Rule 37, counsel for Mr. Crist sent letters to all counsel of record in the consolidated appeals arising out of the Eighth Circuit's decision in *Mille Lacs Band of Chippewa v. State of Minnesota, et al.*, requesting their consent to his filing of a brief in support of the petitioners.

2. Petitioners, John Thompson et al., and respondents Mille Lacs Band of Chippewa, Red Cliff Band of Lake Superior Chippewa, the Sokoagan Chippewa Community and the individual Mille Lacs plaintiffs, by and through their attorneys, have consented to the filing of the brief.

3. Counsel for respondents, Fond Du Lac Band of Chippewa Indians and Bad River Band of Chippewa Indians, have declined to consent to the filing of this amicus brief.

4. The remainder of the parties have not, as of the filing of this motion, indicated their consent or refusal to consent, although all parties of record in No. 97-1357 were sent letters requesting their consent.

5. The proposed brief of Dean Crist approaches the Indian Claims Commission issue from a different point of view than the petition filed by Thompson *et al.*, and

argues relevant policy issues not addressed by this or the related petitions filed by the State of Minnesota and Aitkin County *et al.*

For these reasons, Dean Crist respectfully requests leave to file a brief *amicus curiae*.

One of the attorneys
for Dean Crist

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The saga of the unfettered fishing and hunting rights of Lake Superior Chippewa bands began in Wisconsin with the Lac Courte Oreilles ("LCO") band in the *Voigt* cases, principally with the Seventh Circuit's decision that the Chippewa retained usufructuary rights in the ceded lands notwithstanding an Executive Order by the President in 1850 terminating those rights. *Lac Courte Oreilles Band, etc. v. Voigt*, 700 F.2d 341, 358-62 (7th Cir. 1983). The instant case raises many of the same issues.

After the Seventh Circuit's decision in *Voigt*, Dean Crist founded and became the leader of an organization known as Stop Treaty Abuse-Wisconsin ("STA-W"). This organization published literature and conducted on-site protests against Chippewa spearfishing in off-reservation waters ceded by the tribe in 19th Century treaties. As a result of Crist and STA-W's alleged interference with the usufructuary rights of the Lac du Flambeau band to spearfish in the off-reservation ceded waters, a judgment pursuant to 42 U.S.C. § 1983 was entered against both Crist and STA-W. *Lac du Flambeau, etc. v. Stop Treaty Abuse-Wisconsin*, 41 F.3d 1190 (7th Cir. 1994), *cert. den.*, 506 U.S. 829. Crist is satisfying that judgment pursuant to an agreement with the Lac du Flambeau.

Crist continues to campaign against what he believes to be the misapprehension of the off-reservation fishing rights retained by the Chippewa after the ceding of their lands. More significantly to this case, Crist maintains that the Chippewa have already been fully compensated for the "loss" of their allegedly usufructuary fishing and hunting rights through the filing of a claim and receipt of

additional compensation from the Indian Claims Commission. The latter issue was addressed by the Eighth Circuit below, but not by the Seventh Circuit in the *Lac du Flambeau* case because of the waiver of the issue through its untimely raising. *Lac du Flambeau v. Stop Treaty Abuse-Wisconsin, Inc.*, 991 F.2d 1249, 1256-57 (7th Cir. 1992). This case presents the opportunity for Crist, in conjunction with the main petition filed by the State of Minnesota, to have this issue fully explored.

SUMMARY OF ARGUMENT

The awards of compensation to the Mille Lacs band and other bands of the Lake Superior Chippewa for lands ceded in ancient treaties precludes their claim to special off-reservation fishing rights. The compensation received for the highest and best use of the lands ceded includes all subordinate uses, including fishing rights. The fact that the Indian Claims Commission did not explicitly compensate the bands for ceded fishing rights is either: a) irrelevant, since the Indian Claims Commission awards precluded all claims that were or could have been brought thereunder; or 2) compelling evidence that the bands understood that their off-reservation fishing rights had been validly extinguished by ancient treaties.

Finally, the continued discrimination in favor of the bands in the distribution of natural resources is inconsistent with basic constitutional and social values.

ARGUMENT

I.

THIS COURT SHOULD ACCEPT CERTIORARI TO END THE HISTORICAL/LEGAL REVISIONISM AND ANACHRONISMS PROPAGATED BY THE EIGHTH CIRCUIT IN THIS CASE AND THE SEVENTH CIRCUIT IN THE *VOIGT* CASES.

This case is an historical and legal nightmare for the nontribal citizens of the states of Wisconsin and Minnesota. The courts of appeals in the *LCO* and *Mille Lacs* cases have had to wade through thousands of pages of 150-year-old accounts of interactions, negotiations and agreements between federal government officials and the aboriginal occupants of the lands in question. In the end, the courts have thrown up their hands and fallen back on the one-sided, but expedient, doctrine of "What did the Indians understand" a/k/a the Indians win. *Washington v. Washington State Commercial Passenger Fishing Vehicle Ass'n*, 443 U.S. 658, 676 (1979), *Mille Lacs*, 124 F.3d at 920.

As a result, in the end, what the natural resource conservationists and other nontribal citizens in Wisconsin and Minnesota have been served up is a warmed over stew of revisionist history and political correctness. This is seasoned with the resentment caused by the Indians' exclusive local franchise to casino gambling and the diminution of the tourist trade in the Lake Superior region. What is then served to the nontribal population in the area is entirely unpalatable. As the cliche goes, it is a recipe for disaster in the form of unequal access to resources and community divisiveness.

And it is all so unnecessary. All of the historical controversy was resolved by the passage of the Indian Claims Commission Act of 1946, 60 Stat. 1049, along with the submission of claims for lands ceded under the several 19th Century treaties by, among others, the Mille Lacs and Wisconsin bands. The Chippewa petition, consistent with the Executive Order of 1850, alleged that the United States had deprived the Chippewa of their rights to hunt and fish on the ceded lands, and sought additional compensation for their "loss." Later, when the 1837 treaty issues were severed from the others, an amended petition was filed making no mention of hunting and fishing rights.

The Eighth Circuit correctly recognized that the Chippewa were compensated by the Commission for the loss of land under the 1837 treaty, with the land being valued at its highest and best use, which was for pine timber and agriculture. The Commission did not *explicitly* value the hunting, fishing and gathering rights allegedly reserved under the 1837 treaty explicitly in its compensation award for those specific losses, despite the fact that the Chippewa had originally complained in their petition that the United States had deprived them of the right to hunt and fish on the ceded lands.

Why, then, did the Eighth Circuit refuse to follow this Court's decision in *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985)? There, the Indian Claims Commission awarded the tribe additional compensation for lands ceded by an ancient treaty. Those lands too were valued at their highest and best uses, which was for stock grazing and timber harvesting. As here, the award by the Commission made no mention of

the value of the usufructuary rights lost as the result of the ceding of the lands. Accordingly, this Court held that the Commission award subsumed all of those rights.

With the Chippewa treaty of 1837, however, there was an explicit reservation of usufructuary rights, albeit with the President maintaining the power (superficial as it turned out to be) to abrogate those rights. The *Klamath* treaty did not specifically reserve those rights. The Eighth Circuit seized upon this distinction to hold that the additional payment for the lands in the Chippewa cases, while not mentioning any payment for "retained" usufructuary rights does not preclude the Chippewa from arguing that those rights were: a) not properly taken away by the Executive Order of 1850; and b) not subsumed within the additional compensation awarded for the ceded lands.

This is where the anachronism of "reserved usufructuary rights" comes into play. **The Chippewa did not make a claim for usufructuary rights in Docket 18-C because they: a) understood those rights to have been extinguished by the Executive Order of 1850; or b) because the Treaty of 1855, by which the Mille Lacs ceded land to the United States upon moving to a reservation, extinguished any usufructuary rights which may have survived the Executive Order.** It was not until this litigation and the *Voigt* case in the 1980s that it became "established" that the Mille Lacs continued to enjoy the usufructuary rights retained under the Treaty of 1837. Had there been any sense in 1957 that Chippewa hunting, gathering and fishing rights on the ceded lands were still viable, there would have been an award, or at least some

mention in the award, of the right to compensation for the loss.

This is where the preclusive effect of an Indian Claims Commission compensation award should control. It has been consistently held that *all* tribal claims accruing prior to the passage of the Claims Commission Act had to be brought before the Commission or were forever barred. *White Mountain Apache Tribe v. Clark*, 604 F.Supp 185 (D.Ariz 1984), *aff'd*, 784 F.2d 921 (9th Cir. 1985); *Havasupai Tribe v. U.S.*, 752 F.Supp.1471 (D.Ariz 1990). As such, with the Chippewa holding a theoretical claim of infringement of usufructuary rights, whether actually pursued or not, the award of additional compensation pursuant to the statute under Docket 18-C should be *res judicata* to all claims that were or *could have been* brought thereunder.

If anything, despite the political incorrectness of the reasoning, the failure of the Commission to mention the extinguishment of usufructuary rights in its additional compensation award is strong evidence that the **INDIANS THEMSELVES** understood that either there were no such rights remaining, or, at the very least, that the award included compensation for the ancient loss of those rights. Given the fervor with which all bands of the Chippewa seem to value their usufructuary rights, and the Chippewa's current belief that they had been wrongly deprived of those rights, it would seem obvious that any claim to the Commission for those big Commission dollars would have included usufructuary rights had the Chippewa truly believed that those rights had been wrongfully foreclosed. Given these two possibilities, the Chippewa's usufructuary rights are foreclosed under

either the preclusive aspect of the 1957 award (if the Chippewa were making a claim for what they believed were still their rights) or the liberal "what the Indians at the time understood" standard (if they thought the rights were extinguished and were NOT making a claim for them).

Moreover, as a matter of simple economic equity, it is rank "double-dipping" for a tribe to be compensated for the loss of land at its highest and best use, then still claim to have rights in the land which involve a use of lesser value. If one sells an object at its highest value, does that not necessarily include selling any less valuable attributes inherent in the object?

Taking the Eighth Circuit's decision to its logical conclusion, one can envision a never-ending succession of claims for aspects of the land not discussed in the additional compensation award of 1957. Suppose, for example, the Chippewa start mining operations on the ceded lands. Under *Klamath*, the mineral rights attendant to the land were subsumed within the Commission's award. But under *Mille Lacs*, because the mineral rights were not included in the 1957 additional compensation award, they would not necessarily be extinguished.

In summary, this Court should accept certiorari to resolve the tension between this case and *Klamath*, and to prevent the continuation of the torture of logic and history for the purpose of a politically correct result.

II.

CERTIORARI SHOULD BE ALLOWED TO GUARANTEE EQUAL AND FAIR ACCESS TO THE NATURAL RESOURCES OF THE REGION.

The legalities of the case are of interest to attorneys, judges and litigants. Dean Crist is none of these. His interest in this case is strictly as a resident and sportsman in the lands ceded by the Chippewa in the 19th Century. He assumed a role of prominence, deserved or not, by his vocal and active opposition to the unequal and destructive effects on the resources as the result of the *Voigt* and subsequent litigation.

What this case is fundamentally about is whether one group of Americans, albeit Americans with a slightly different status for various legal and historical reasons, should have unequal access to the natural resources of the region. It is beyond dispute that the government and area residents have a compelling interest in the conservation and promotion of the native fish, game and wildlife. This interest should be paramount to a spurious claim to usufructuary rights, especially where there have been numerous opportunities for the tribe to claim compensation for the supposed infringement of those "retained" rights.

Superficially, the Chippewa have assumed some stewardship of these resources. In Wisconsin, there is some control exercised by the Department of Natural Resources. But there can be no true regulation when one of the primary consumers of the resources is immune from ultimate governmental control. The concept of one group of Americans being subject to resource control,

while another group is effectively immune, is antithetical to basic constitutional norms of equality among citizens.

There is no defensible moral reason why an Indian tribesman should enjoy greater rights in a resource than non-Indian citizens. The "right" to fish and hunt on the ceded lands should include the right to fish and hunt consistently with the government's interest in managing and conserving these precious resources. The *Mille Lacs* and *Voigt* decisions trample on this basic moral precept.

Moreover, this outcome is at odds with the whole underlying purpose of the Indian Claims Commission. The Commission was designed to settle once and for all any tribal claims that they had received unfair and unequal treatment from the government in the past. Having submitted themselves to the process and been paid millions of dollars, it is ludicrous to allow them to maintain a claim for superior rights to a scarce natural resource. While there may be no specific constitutional infirmity in this outcome, it smacks of racial inequality inconsistent with the aims and goals of the Equal Protection Clause of the Fourteenth Amendment.

In the conclusion to the Eighth Circuit opinion, there is hope expressed that the Indians and the State of Minnesota will cooperate in resource conservation and management. 124 F.3d at 934. This is all well and good, but as Woody Allen said, "The lion may lie down with the lamb, but the lamb won't get much sleep." The Chippewa judgment effectively exempts them from the laudable goals of equal access to, and conservation of, scarce and precious resources. This Court, in addition to resolving the legal tensions stemming from the various decisions in this

area, should accept certiorari to assure equal access to this resource.

Respectfully submitted,

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